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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

—v.—

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

The Securities Industry Association, Inc., through its Compliance and Legal Division ("SIA"), submits this brief as *amicus curiae* in support of the Petitioner and urges this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit with respect to the opinion and judgment of the Ninth Circuit below in *Prudential Insurance Company of America* v. *Lai*, 42 F.3d 1299 (9th Cir. 1994). Pursuant to Rule 37.2 of the Rules of this Court, the written consent of all parties has been obtained and filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

SIA is the principal trade association of the securities industry. It has as members more than seven hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate disputes between securities firms and their employees may be enforced. Indeed, the rules and the registration applications of self-regulatory organizations in the securities industry, including the National Association of Securities Dealers, Inc. ("NASD"), require arbitration of employment disputes between securities firms and their employees. Because arbitration is an efficient, fair and economical manner of resolving disputes, SIA believes that employment disputes between securities firms and their employees should be arbitrated in most instances. Accordingly, this *amicus curiae* brief is one of several such briefs that SIA has submitted to this Court concerning arbitration issues in which SIA has urged the Court to continue in its enforcement of the strong federal policy favoring arbitration.[1]

This Court has previously held in *Gilmer* v. *Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), that in the presence of an agreement to arbitrate employment disputes, such disputes must be submitted to arbitration even where statutory employment claims are at issue. In light of the Ninth Circuit's decision below, which is contrary to the rulings of all other Circuits on these issues, mandatory arbitration of federal and state statutory employment discrimination claims is no longer certain. Nor, in light of the conflict in the Circuits, is it cer-

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[1] SIA also submitted *amicus curiae* briefs in the following cases: *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987); and *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985).

tain whether before proceeding to arbitration there must be a preliminary judicial finding that the parties "knowingly agreed" to arbitrate their statutory employment discrimination claims. In the face of these uncertainties, SIA and its member firms have a substantial interest in this Court's grant of *certiorari* in this case.

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Ninth Circuit below reflects the suspicion courts once held of the arbitral process, *see Wilko* v. *Swan*, 346 U.S. 427 (1953), as opposed to the congressionally enacted federal policy recognizing arbitration as a fair and efficient means of resolving disputes. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). Specifically, the court below declined to apply the correct standard to determine arbitrability, articulated by this Court in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Instead, based on purported inadequacies in the arbitration process, the court imposed an additional requirement to enforce the arbitration of a statutory claim, the finding of a so-called "knowing agreement" to arbitrate. Not only does the Ninth Circuit's decision conflict with this Court's holding in *Gilmer*, as well as decisions in other courts of appeals, it also represents potential confusion for the securities industry which, in following the decision below, is faced with the inability to enforce arbitration agreements according to their terms.

Under the Ninth Circuit's highly subjective "knowing agreement" standard, even enumerating each claim that is subject to arbitration would not necessarily ensure an enforceable arbitration agreement, nor would it obviate the need for a preliminary judicial finding regarding the employee's understanding as to the extent of the agreement to arbitrate. Such a result only hampers the efficiency that arbitration is designed

to provide and increases the judicial involvement that arbitration is intended to alleviate. *See Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 115 S. Ct. 834, 841 (1995). Furthermore, this existing conflict in the Circuits threatens the uniformity of the registration application (in which the arbitration agreement is contained), thereby defeating the goal of streamlining the paperwork required to register and regulate members of the securities industry.

SIA respectfully requests that the petition for *certiorari* be granted to resolve this conflict and further define the scope and validity of arbitrable rights within the securities industry.

POINT I

THE NINTH CIRCUIT'S DECISION IS A RADICAL DEPARTURE FROM WELL-SETTLED FEDERAL LAW AND POLICY FAVORING ARBITRATION

A. This Court Has Consistently Enforced Arbitration Agreements

This Court's mandate in recent decisions to compel the enforcement of arbitration agreements has been unambiguous, even when statutory rights are involved. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employment discrimination claims); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (claims under the Securities Act of 1933); *Shearson/American Express, Inc.*, v. *McMahon*, 482 U.S. 220 (1987) (claims arising under the Racketeer Influenced and Corrupt Organizations Act and the Securities Exchange Act of 1934); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims). Indeed, this Court held, in a landmark decision, that an agreement to arbitrate an age discrimination claim under the Age Discrimination in Employment Act is enforceable under the Federal Arbitration Act ("FAA").

Gilmer, 500 U.S. 20. In *Gilmer*, the employee was required to sign the Uniform Application for Securities Industry Registration ("Form U-4"). By signing the Form U-4, the employee agreed, *inter alia*, to submit disputes arising between himself and his employer to arbitration, pursuant to the rules of the New York Stock Exchange, Inc. ("NYSE").[2] This Court reasoned that since the FAA manifests a liberal policy favoring arbitration, statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Gilmer*, 500 U.S. at 26 (*citing Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) and *Mitsubishi*, *supra*).

The Ninth Circuit, however, has now undermined the law and policy favoring arbitration by requiring a preliminary judicial finding as to whether the securities professionals have "knowingly agreed" to arbitrate employment discrimination claims. This standard flies in the face of the reasoning of this Court in *Gilmer* which, like the instant case, involved an employment discrimination claim and an arbitration agreement contained in a Form U-4. This Court enforced the arbitration agreement in *Gilmer* without imposing the requirement of a preliminary finding that the parties "knowingly agreed" to arbitrate.[3]

In another recent decision on the enforceability of arbitration agreements, this Court reversed an Alabama Supreme

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[2] Specifically, the arbitration agreement contained in the Form U-4 provides:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . .

[3] The Fifth Circuit Court of Appeals has expressly rejected the application of a "knowing waiver" standard in a case involving a registered representative who had signed a Form U-4. *Williams* v. *Cigna Financial Advisors, Inc.*, No. 94-11030, 1995 WL 366226 (5th Cir. June 19, 1995).

Court decision imposing a state statutory requirement that Alabama courts first inquire whether the parties "contemplated" that their arbitration agreement would involve "substantial interstate activity" before giving such agreements the force accorded by the FAA. *Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 115 S. Ct. 834 (1995). In so doing, this Court expressly declined to adopt an interpretation of § 2 of the FAA that would "invite[ ] litigation about what was, or was not, 'contemplated.' " *Id.* at 841. The rationale of *Allied-Bruce* requires a similar conclusion here.

B. The Requirement Of A Finding That The Parties "Knowingly Agreed" To Arbitrate Is Contrary To Basic Principles Of Contract Law.

The Ninth Circuit, in its holding below, reversed the judicial presumption in favor of arbitration when interpreting arbitration agreements involving statutory employment discrimination claims. Under the Ninth Circuit's decision, courts would be required to determine preliminarily whether the parties "knowingly agreed" to arbitrate such claims. To require such a finding is tantamount to disposing of one of the basic tenets of contract law: that a party is bound by the terms of the agreement that the party signs.

It is standard, hornbook law that one who signs a contract is presumed to have read and understood its contents, and will be bound to the terms of that contract regardless of whether she actually examined the document. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-42 (3d ed. 1987) ("party who signs an instrument . . . may not later complain . . . that he did not understand its contents").[4] In light of this

[4] Federal courts of appeals have consistently agreed. *See Heller Financial, Inc.* v. *Midwhey Power Co.*, 883 F.2d 1286, 1292 (7th Cir. 1989) ("basic contract law establishes a duty to read the contract; it is no defense to say, 'I did not read what I was signing' "); *Morta* v. *Korea Ins. Corp.*, 840 F.2d 1452, 1458 n.7 (9th Cir. 1988) (where plaintiff signed an unambiguous "release" clearly stating that he was waiving his right to

doctrine, the Ninth Circuit's notion of "knowingly agreed" is illusive.[5]

The fact that an agreement has been signed by the parties is, by itself, proof that the parties read and understood the terms of the document. Moreover, the Form U-4 is not a complex, lengthy document, filled with confusing legalese or hidden terms. On the contrary, the Form U-4 is written in simple and clear language. The terms of the various agreements and certifications contained therein are all set forth on one page, and each separate provision is numbered. The applicant for registration is instructed to "READ THE FOLLOWING VERY CAREFULLY". *See* Petition for Writ of *Certiorari* at App. 23, 24. In addition, a clear and concise instruction sheet accompanies each Form U-4 application.

Accordingly, absent legally sufficient excuses from performance, the arbitration agreement contained in the Form

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"all claims . . . foreseen and unforeseen", he could not escape the provision by claiming he had not read it); *Coleman* v. *Prudential Bache Securities, Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("absent a showing of fraud or mental incompetence", customer was bound by arbitration agreement she signed); *Jakobson Shipyard, Inc.* v. *Aetna Casualty and Surety Co.*, 775 F. Supp. 606, 613 (S.D.N.Y. 1991), *aff'd*, 961 F.2d 387 (2d Cir. 1992) ("It is axiomatic that the signer of a contract is presumed to have read and understood all he signs").

[5] The Ninth Circuit did not dispute that parties *can* agree to arbitrate statutory claims. It held, however, that plaintiffs in this case, securities professionals, "could not have understood that in signing [the Form U-4], they were agreeing to arbitrate sexual discrimination suits." *Prudential Insurance Company of America* v. *Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994). The basis for this factual finding is a mystery. As stated by Judge Norris in his concurring opinion, "I am concerned . . . that the majority engages in appellate fact-finding by holding that these particular employees did not knowingly waive their trial rights, even though the district court never made a finding on the issue." *Id.* at 1306. For the Ninth Circuit to accept plaintiffs' purported ignorance of the scope of their arbitration agreement is to treat securities industry professionals with a paternalism usually reserved for individuals whose capacity to contract is in question.

U-4 should be enforced according to its terms. To graft on an additional requirement of "knowing agreement" denigrates the legal and practical rationale behind binding the parties who sign an agreement. Moreover, the Ninth Circuit's refusal to accept the parties' signatures as proof of having "knowingly agreed" when claims of statutory employment discrimination are involved, while accepting their assent as sufficient for all other claims, results in inconsistencies in enforcement of the arbitration provision, as well as other provisions of the Form U-4. Without further guidance from this Court, the securities industry (as well as other groups who regularly invoke arbitration) are left with uncertainty as to which statutory claims are arbitrable and what preliminary steps, if any, are necessary to enforce an arbitration agreement. As such, this Court should grant a writ of *certiorari*.

POINT II

THE NINTH CIRCUIT'S DECISION UNDERMINES IMPORTANT POLICY CONSIDERATIONS CONCERNING THE FORM U-4 WITHIN THE SECURITIES INDUSTRY

The Ninth Circuit's finding below that signing a U-4 does not constitute a "knowing agreement" to arbitrate statutory employment discrimination claims is inconsistent with the terms and purposes of the Form U-4. The Form U-4 is a personal registration form for individuals engaged in the securities business. The NASD, the NYSE, and other self-regulatory organizations cooperated in the development of Form U-4 in an effort to streamline the flow of information within the securities industry needed for regulatory purposes with respect to individual registered representatives. Adoption of Forms U-3 and U-4, Exchange Act Release No. 11,424, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,176, at 85,326 (May 16, 1975). Various provisions, including the one binding the registered person to arbitration, have been

permitted to be incorporated in the Form U-4 to decrease the number of required employment documents. *See* Adoption of Revised Form U-4, Exchange Act Release No. 17,388, 45 Fed. Reg. 84,992 (1980).

The rules of the NASD, the NYSE, and other self-regulatory organizations have included compulsory arbitration provisions since before the creation of Form U-4. Indeed, the rules of the NASD, the NYSE, and other self-regulatory organizations make it *mandatory* for a registered representative to arbitrate any employment-related dispute.[6] The version of Form U-4 signed by plaintiff-respondent Elvira Viernes provided:

> I . . . hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules

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[6] Rule 347 of the NYSE, requiring the arbitration of "[a]ny controversy between a registered representative and any member . . . arising out of the employment or termination of employment of such registered representative", 2 NYSE Guide (CCH) ¶2347 (1995), has been in existence since 1958. *Association of Investment Brokers* v. *Securities and Exchange Commission*, 676 F.2d 857, 860 & n.8 (D.C. Cir. 1982). Part II, Section 8 of the NASD Code of Arbitration Procedure (the "NASD Code") was recently amended as a clarification of *existing* policy to provide that: "[a]ny dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associate person(s), *or arising out of the employment or termination of employment of such associated person(s) with such member*, shall be arbitrated under this Code, at the instance of . . . (2) a member against a person associated with a member". NASD Code Part II § 8, NASD Manual (CCH) ¶3708 (1995) (emphasis added). The italicized language above was added in an October 1, 1993 amendment to clarify that the arbitration of employment-related disputes is compulsory. *See Hall* v. *MetLife Resources*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶98,742, at 92,517 (S.D.N.Y. May 2, 1995) (holding that plaintiffs, by signing Form U-4, were bound to arbitrate their Title VII claims, even though forms were signed prior to 1993 amendment to NASD Code, as amendment was "merely a clarification of existing policy").

> and regulations of the states and organizations as they are and may be adopted, changed or amended . . . .[7]

Given that the rules of the NASD require arbitration of employment-related disputes, the Ninth Circuit's decision is inconsistent with the rules of the NASD that the employee agrees to abide by in the first instance.

The Form U-4 also requires that the securities firm certify that the employee is familiar with the "statute(s), constitution(s), rules and by-laws of the agency, jurisdiction, or self-regulatory organization. . . ." Inasmuch as mandatory arbitration of employment-related disputes is a part of the NASD rules, securities professionals are thus certified to be familiar with such provisions at the time of signing the Form U-4. The Ninth Circuit's decision ignores this critical fact and, indeed, undermines the regulatory desire to charge registered persons with knowledge of the rules of the various self-regulatory organizations through the Form U-4.

Additionally, the Ninth Circuit's decision effectively holds that an arbitration agreement is only enforceable where it specifically enumerates the statutory claims encompassed therein. Accordingly, to comply with the decision, a *new* Form U-4 would have to be created especially for use within the jurisdiction of the Ninth Circuit with a lengthy arbitration agreement listing every potential statutory claim covered by the agreement. This would create a new burden inconsistent with the regulatory desire to reduce paperwork in and streamline the securities registration process. Furthermore, given the subjectivity of the Ninth Circuit's standard of a "knowing

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[7] Similarly, plaintiff-respondent Justine Lai signed a later version of the Form U-4 agreeing to:

> abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time . . . .

See Petition for Writ of *Certiorari* at App. 23, 24.

agreement", such an enumeration of arbitrable claims still would not provide certainty as to whether the employee agreed to arbitrate such claims.

The Ninth Circuit's decision reverses two decades of progress that has been made in the securities industry toward the development of an efficient system of registration, reporting and dispute resolution through the Form U-4 that does not impose undue burdens on securities firms who seek to comply with that system.

CONCLUSION

For the reasons set forth above, *amicus* Securities Industry Association, Inc. respectfully requests that the petition for a writ of certiorari be granted.

Dated: July 20, 1995

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